Office - Supreme Court, U.S.
FILED
JUN 15 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 122

MARTIN O. WEISBROD,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PHILIP B. KURLAND
JOHN PAUL STEVENS
MARTIN O. WEISBROD
Counsel for Petitioner

ROTHSCHILD, STEVENS & BARRY
120 S. LaSalle Street
Chicago, Illinois
Of Counsel

The Scheffer Press, Inc.—ANdover 3-6850

TABLE OF CONTENTS.

	PAGE
Question Presented	2
Statement	2
Specification of Errors	3
Reasons for Granting the Writ	3
Conclusion	7
Appendix	1a

Cases Cited.

Cooke v. United States, 91 U. S. 389 (1875) 6

Erie Coal & Coke Co. v. United States, 266 U. S. 518 (1925) 3n.1

Fulton Iron Co. v. Larson, 171 F. (2d) 994 (CA 4, 1948), cert. denied, 336 U. S. 903 (1949) 3n.1

Harrison v. Cage, 5 Mod. 411 (1698) 4n.2

North & Judd Mfg. Co. v. United States, 114 Ct. Cl. 355, 84 F. Supp. 649 (1949) 3n.1

Priebe & Sons v. United States, 332 U. S. 407 (1947) 3, 4, 5

Schneiderman v. United States, 117 Ct. Cl. 715, 93 F. Supp. 626 (1950) 3n.1

Silverton v. United States, 118 Ct. Cl. 232 (1951) 3n.1

United States v. National Exchange Bank of Baltimore, 270 U. S. 521 (1926) 6

United States v. Wunderlich, 342 U. S. 98 (1951) 3n.1

Willard, Sutherland & Co. v. United States, 262 U. S. 489 (1923) 4n.2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. _____

MARTIN O. WEISBROD,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled cause on March 17, 1953.

Opinion Below.

The opinion of the Court of Appeals (R. 22) is reported in 202 F. (2d) 629.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

Question Presented.

Whether an executory contract for the sale of surplus war property which is not binding on the Government is nevertheless enforceable by the Government.

Statute Involved.

The Court of Appeals relied on portions of Section 2 and Section 6 of the Surplus Property Act of 1944, 58 Stat. 765, quoted in the Appendix to this petition.

Statement.

In April 1945 petitioner signed a government "Bid and Contract Form" which was accepted by the Government. The form stated that petitioner "will buy, subject to the terms and conditions stated below" certain war surplus chemicals located in Denver, Colorado. (R. 8). One of the stated "terms and conditions" was an escape clause reading as follows:

> "The Government also reserves the right to withdraw from sale any property prior to the removal thereof without incurring any liability except to refund to the purchaser any amount paid with respect to such property." (R. 6)

Before the removal of any of the property, defendant refused to accept delivery of the goods. (R. 3). The Government resold the goods for $670.32 less than the price specified in the contract form. (R. 3-4).

In January 1951 the Government filed suit for $670.32. (R. 3-4). Petitioner moved to strike the complaint on the ground that the alleged contract was unenforceable because it lacked mutuality of obligation (R. 11). The District Court overruled the motion and, after petitioner elected to stand on his motion, entered judgment in favor of the Government. (R. 12).

The Court of Appeals affirmed. It held that the escape clause was properly embodied in the contract but it did not discuss the question whether the clause rendered the contract unenforceable, except to state:

> "If one does not wish to bid for Government Surplus Property with the conditions attached, his alternative is to make no bid." (R. 28). 202 F. (2d) at 632.

Specification of Errors to be Urged.

The Court of Appeals erred:

1) In holding that an executory contract which is not enforceable against the Government is nevertheless enforceable by the Government.

2) In affirming the judgment of the District Court.

Reasons for Granting the Writ.

The Court of Appeals Has Erroneously Decided an Important Question of Federal Law.

A. *The Court of Appeals failed to give proper effect to applicable decisions of this Court.*

Absent specific legislation to the contrary, the enforceability of provisions in Government contracts is determined by the principles of general contract law. *Priebe & Sons* v. *United States*, 332 U. S. 407 (1947) and cases cited at p. 411. Under no circumstances could petitioner have enforced this contract against the government prior to the actual removal of the goods. This is made clear by the language of the escape clause itself as well as by decisions giving effect to the clause.[1] Accordingly, as a matter of

[1] Silverton v. United States, 118 Ct. Cl. 232, 246 (1951); Schneidermann v. United States, 117 Ct. Cl. 715, 93 F. Supp. 626, 627, 630 (1950). Cf. Erie Coal & C... Co. v. United States, 266 U. S. 518, (1925); United States v. Wunderlich, 342 U. S. 98 (1951); Fulton Iron Co. v. Larson, 171 F. (2d) 994 (CA 4, 1948), cert. denied, 336 U. S. 903 (1949); North & Judd Mfg. Co. v. United States, 114 Ct. Cl. 355, 84 F. Supp. 649 (1949).

general contract law, since the Government was not bound by the contract, neither was the petitioner; the contract, while executory, lacked consideration and mutuality of obligation.[2] This general principle controls the instant case unless Congress has adopted a contrary rule for the disposal of war surplus property.

Petitioner does not question the power of Congress to abolish the doctrine of consideration. Nor does petitioner question the validity or propriety of escape clauses in Government contracts. The question presented simply involves the effect of such a clause on the enforceability of the contract. No doubt the Congress could provide that executory contracts shall be enforceable by the Government even though not binding on the Government. But Congress did not so provide in the Surplus Property Act of 1944 or in any other applicable statute.

The Surplus Property Act of 1944 contains a declaration of purposes in general language and a direction that a disposal of surplus property be coordinated with the program of the armed forces "in the interest of the war effort." Such general provisions cannot be tortured into a grant of authority to enter into contracts binding on contract purchasers from the Government but not on the Government. Such a construction is foreclosed by the decision in *Priebe & Sons* v. *United States*, 332 U. S. 407 (1947).

In that case, dealing with the enforceability of a penalty provision in a Government procurement contract, the Court

---

[2] See Harrison v. Cage, 5 Mod. 411 (1698); Williston, The Effect of One Void Promise in a Bilateral Agreement, 25 Col. L. Rev. 857 (1925). In Willard, Sutherland & Co. v. United States, 262 U. S. 489 (1923) this Court applied the general rule to a government contract to purchase coal for the Navy. The contract there involved did not require the government to take delivery of any coal and therefore, despite the fact that it purported to bind the other party, was not enforceable either by or against the government prior to actual delivery. See esp. 262 U. S. at 493-494.

considered and expressly rejected the argument that a general delegation of war procurement power was sufficient to create an exception in favor of the government from a well settled principle of general contract law. Since procurement is more directly related to the conduct of war than is the disposal of surplus property, and since the doctrine of mutuality of obligation is at least as thoroughly embedded in the general law of contracts as is the distinction between a penalty and an agreement for liquidated damages, the Court's reasoning in *Priebe* is necessarily applicable here. The concluding sentence of the opinion of the Court in that case clearly states petitioner's position. It reads:

> "The other view is such a radical break with the past and so counter to the whole development of the law as to indicate that the congressional purpose should be plain before we take the step." (332 U. S. at p. 414).

Petitioner submits that a congressional purpose to abandon the doctrine of consideration for Government contracts, which certainly would be a radical break with the past and counter to the whole development of the law of contracts, is not plainly or remotely suggested by the language of the statute involved in this case.

B. *The Question is of General Importance.*

The resolution of the question presented by this case may well determine the enforceability of all Government contracts containing an escape clause. It is normal for legislative enactments to contain general, and often strongly phrased, statements of purpose. If the language of the Surplus Property Act of 1944 is sufficiently specific to modify the doctrine of mutuality of obligation, it is probable that every statute investing the Executive with

procurement or disposal powers will also contain language authorizing the enforcement by the Government of contracts which are not binding on the Government. Thus, the importance of this case is not to be measured either by the $670.32 directly at stake, or by the value of the several billions of dollars worth of goods sold under contracts containing precisely the same escape clause.[3]

The decision below represents a major departure from the basic principle stated in *Cooke* v. *United States*, 91 U. S. 389, 398 (1875):

> "If [the government] comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws that govern individuals there".

Half a century later the *Cooke* case was cited by Mr. Justice Holmes for the statement: "The United States does business on business terms." *United States* v. *National Exchange Bank of Baltimore*, 270 U. S. 521, 534 (1926). A decision which will enable the Government to do business on its own terms merits the attention of this Court.

[3] As the Government pointed out at page 4 of its brief in the Court of Appeals, all sales of war surplus property were made subject to the condition contained in this escape clause. The value of the property sold is described in the Quarterly Progress Report to the Congress by the War Assets Administration. Second Quarter, 1949, p.p. 2-3.

CONCLUSION.

It is respectfully submitted that there is here presented a proper question for decision by this Court and that a writ of certiorari issue.

Respectfully submitted,

MARTIN O. WEISBROD, Petitioner

By PHILIP B. KURLAND,

JOHN PAUL STEVENS,

MARTIN O. WEISBROD,
Counsel for Petitioner.

ROTHSCHILD, STEVENS & BARRY,
120 South La Salle Street,
Chicago 3, Illinois.

APPENDIX.

The Surplus Property Act of 1944, 58 Stat. 765, provides in part:

"Sec. 2. The Congress hereby declares that the objectives of this Act are to facilitate and regulate the orderly disposal of surplus property so as—

(a) to assure the most effective use of such property for war purposes and the common defense;

(b) to give maximum aid in the reestablishment of a peacetime economy of free independent and private enterprise, the development of the maximum of independent operators in trade, industry and agriculture, and to stimulate full employment;

(c) to facilitate the transition of enterprises from wartime to peacetime production and the individuals from wartime to peacetime employment;

• • •

(f) to afford returning veterans an opportunity to establish themselves as proprietors of agricultural, business and professional enterprises;

(g) to encourage and foster post-war employment opportunities;

(h) to assure the sale of surplus property in such quantities and on such terms as will discourage disposal to speculators or for speculative purposes;

• • •

(n) to utilize normal channels of trade and commerce to the extent consistent with efficient and economic distribution and the promotion of the general objectives of this Act, (without discriminating against the establishment of new enterprises;

• • •

"Sec. 6 The activities of the [Surplus Property Board][4] shall be coordinated with the programs of the armed forces of the United States in the interests of the war effort. Until peace is concluded the needs of the armed forces are hereby declared and shall remain paramount."

[4] The functions of the Surplus Property Board were transferred to War Assets Administration on January 31, 1946 (See Executive Order 9689, 50 U.S.C. App. § 1614(a), note. 11 F.R. 1265) and subsequently retransferred to the General Services Administration. See Public Law 152, 81st Congress, Section 105; 63 Stat. 377, 381.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	4
Conclusion	11
Appendix	12

CITATIONS

Cases:	
Cooke v. *United States*, 91 U.S. 389	10
Erie Coal & Coke Corp. v. *United States*, 266 U.S. 518	9
Goltra v. *Weeks*, 271 U.S. 536	9
Lobenstein v. *United States*, 91 U.S. 324	8
North & Judd Manufacturing Co. v. *United States*, 114 C. Cls. 355	5, 8
Priebe & Sons v. *United States*, 332 U.S. 407	10
Refining Associates, Inc. v. *United States*, 109 F. Supp. 259	9
Schneiderman v. *United States*, 117 C. Cls. 715	5, 8
Scott v. *United States*, 44 C. Cls. 524	9
Silverton v. *United States*, 118 C. Cls. 232	5, 7, 8
Singleton v. *District of Columbia*, 198 F. 2d 945	9
Sylvan Crest Sand and Gravel Co. v. *United States*, 150 F. 2d 642	8, 9
United States v. *National Exchange Bank*, 270 U.S. 527	10
United States v. *Purcell Envelope Co.*, 249 U.S. 313	8
Wisconsin & M. Ry. v. *Powers*, 191 U.S. 379	6
Statutes:	
Act of September 18, 1945, c. 368, 59 Stat. 533	4
Federal Property and Administrative Services Act of 1949, 63 Stat. 377	4
Surplus Property Act of 1944, 58 Stat. 765, as amended by the Act of May 3, 1946, c. 248, 60 Stat. 168:	
Section 2	10, 12
Section 4	5, 7, 14
Section 6	6, 14
Section 12	5, 6, 15
Section 16	6, 15
Miscellaneous:	
Executive Order No. 9689, 11 F. R. 1265	4
66 Harvard Law Review 1312	7
Restatement, *Contracts*, Sections 77, 79, 84	9
1 Williston, *Contracts* (Rev. Ed. 1936) §§ 103F, 104	9

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 122

MARTIN O. WEISBROD, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the United States District Court for the Northern District of Illinois (R. 12) was not accompanied by an opinion. The opinion of the Court of Appeals (R. 22-28) is reported at 202 F. 2d 629.

JURISDICTION

The judgment of the Court of Appeals was entered on March 17, 1953 (R. 29). The petition for a writ of certiorari was filed on June 15, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a Government contract to sell war surplus property is rendered unenforceable against the buyer by the inclusion of a condition permitting the Government to "withdraw from sale any property prior to the removal thereof."

STATUTE INVOLVED

The pertinent provisions of the Surplus Property Act of 1944, 58 Stat. 765, as amended by the Act of May 3, 1946, c. 248, 60 Stat. 168, are set forth in the Appendix, *infra,* pp. 12-15.

STATEMENT

The United States brought this action against the petitioner to recover damages for the breach of a contract to purchase a quantity of sodium carbonate sold by the Office of Surplus Property, Department of Commerce, under the Surplus Property Act of 1944, *infra,* p. 12. The facts, as alleged in the pleadings, are as follows: On April 18, 1945, petitioner submitted his bid of $934.92 for 1764 bottles of sodium carbonate on a Department of Commerce standard form surplus property sales bid and contract form (R. 8-9). The standard bid form provided that the bid should be subject to so-called Treasury Department Sales Conditions No. 1 (R. 6), which comprised a set of eight standard form conditions or terms of surplus property sales. Condition No. 8 of these read as follows (R. 6):

> 8. The Government reserves the right to reject any or all bids or parts thereof, and to

waive technical defects therein. *The Government also reserves the right to withdraw from sale any property prior to the removal thereof without incurring any liability except to refund to the purchaser any amount paid with respect to such property.* The Government further reserves the right to cancel the contract without liability if made on behalf of any principal whose name and address is not set forth in the bid. [italics supplied].

On April 28, 1945, the Government notified the petitioner that his bid was accepted, and, on May 7, 1945, it sent him a standard form Notice of Sale, containing directions for payment for and removal of the goods (R. 7-7A). After receiving the Notice of Sale, the petitioner, apparently without offering any reason, refused to make payment or to accept delivery of the goods, although the Government was at all times ready to perform (R. 3). The Government was compelled to resell the goods for $264.60, which was $670.32 less than the purchase price agreed upon in the contract with the petitioner (R. 3-4).

The Government brought this action to recover the difference, alleging the making of the contract, its own performance, and the breach by the petitioner. Copies of the bid, of the Notice of Sale, and of Treasury Department Sales Conditions No. 1 were attached. The petitioner moved to dismiss the complaint on the ground that the presence in the contract of Condition No. 8, *supra,* reserving to the Government "the right to withdraw from

sale any property prior to the removal thereof" rendered the Government's undertaking illusory, so that the contract was void for lack of mutuality of obligation and the buyer was under no duty to perform. The district court rejected the contention and denied the motion (R. 12), the petitioner refused to answer over, judgment was entered, and the petitioner appealed (R. 12, 13). The Court of Appeals affirmed (R. 22-28), holding in part that the purpose of the reservation of the right to withdraw the goods from sale was to provide for situations in which goods previously declared surplus might again become essential for military use, and that the clause therefore did not make the contract invalid (R. 28). The Court also held in part that "[i]n disposing of surplus property the Government is not engaged in normal trade," and it therefore may validly attach conditions that might otherwise invalidate the contract (*id.*).

ARGUMENT

Although the question presented in this case is of possible applicability in other surplus property sale contracts containing a similar condition,[1] we think the issue is so completely lacking in substance as to require no review by this Court. The

[1] The functions assigned by the Surplus Property Act to the Surplus Property Board were transferred by the Act of September 18, 1945, c. 368, 59 Stat. 533, to the Surplus Property Administration. From there they were transferred to the War Assets Corporation by Executive Order No. 9689, 11 F. R. 1265. The Federal Property and Administrative Services Act of 1949, 63 Stat. 377, 385, 399, transferred these functions to the General Services Administration and repealed the Surplus Property Act.

judgment is plainly correct, there is no conflict, and the escape clause here contained in Condition No. 8 has been before the Court of Claims at least three times; each time that court has impliedly upheld the validity of contracts containing it. *Silverton* v. *United States,* 118 C. Cls. 232; *Schneiderman* v. *United States,* 117 C. Cls. 715; *North & Judd Manufacturing Co.* v. *United States,* 114 C. Cls. 355.

Petitioner's contention, in effect, is that the inclusion of the escape clause, permitting the Government to withdraw the goods from sale before delivery, gives the Government a choice of refusing to perform the contract without detriment to itself, so that its agreement to sell is illusory and cannot constitute sufficient consideration for the petitioner's promise to buy. Our view is that even if the law of consideration in contracts between private persons is applicable to this contract, the Government's obligation, under settled and elementary principles, constitutes sufficient consideration. Moreover, it is well established that the law of consideration is less stringent as applied to government contracts than as applied to private contracts.

1. Section 4 of the Surplus Property Act of 1944, *infra,* p. 14, provided that "surplus property shall be disposed of * * * upon such terms and conditions * * * as may be prescribed in or pursuant to this Act." Among the provisions to be implemented by the terms and conditions of sale were those of Section 12(a) of the Act, *infra,* p. 15, which provided that transfers of surplus

property from one government agency to another for the use of the latter should be given priority over all other disposals; those of Section 6, *infra*, pp. 14-15, which provided that until peace should be concluded the needs of the armed forces should be paramount; and those of Section 16(a), *infra*, p. 15, which directed the enactment of regulations effecting priorities for returning veterans.

Clearly, Congress had the power, as petitioner concedes (Pet. 4), to require contracts made under the Act to be binding on the buyer and not on the Government—that is, to abolish the requirement of consideration. See *Wisconsin & M. Ry.* v. *Powers*, 191 U.S. 379, 386. Short of this, Congress could have provided that contracts under the Act should be binding despite the inclusion of express provisions permitting the Government to cancel sales whenever intervening priority needs of the armed forces under Section 6, of other agencies under Section 12(a), or of veterans under Section 16(a) made it expedient to do so. But it is not necessary here to decide whether in enacting this statute Congress meant so to provide. The escape clause must be construed in the light of the statutory policy expressed in Sections 6, 12 and 16, and we think that, as so construed, it is plainly valid under elementary principles of the law of consideration as applied to private contracts. Hence it is unnecessary to determine whether the statute changed the law of consideration.[2]

[2] Likewise it need not be argued that the statutory authorization to prescribe terms and conditions "pursuant to

a. On this record, there is nothing to suggest that the escape clause embodies more than a right to withdraw goods from sale to the public at large, up to the time of delivery, for the purpose, but only for the purpose, of carrying out one of the enumerated paramount statutory objectives. There is nothing to suggest that the Government may cancel the contract arbitrarily or capriciously, or that it is not under a binding obligation which may not be cancelled except on condition that cancellation is necessary to provide for the intervening needs of other agencies, of the armed forces, or of sales to veterans.[3]

This construction is supported not only by reference to the statute but by the language of the escape clause itself, which is not that the Government may cancel the contract but only that it may "withdraw" the goods "from sale"—clearly implying a promise that if the goods are not delivered to the buyer, they will not be sold to the public at large. Presumably, they will be turned over to those having a statutory priority. Moreover, the Court of Claims has so construed the escape clause in *Silver-*

---

this Act" (Section 4, *infra*, p. 14) authorized the Surplus Property Board to prescribe regulations having the effect of abolishing the requirement of consideration. It may well be that contracts made under such an authorization are not subject to the ordinary law of consideration. See 66 Harv. L. Rev. 1312.

[3] If petitioner could show that the contract had a less restricted meaning, its validity might be more questionable, and it is possible that such a showing might turn on questions of fact, such as practical construction by the parties. But on this record, consisting only of the complaint and motion to dismiss, there can be no such showing. The Government had not shown any inclination to exercise its rights under the clause; it was at all times prepared to perform.

ton v. *United States,* 118 C. Cls. 232, 246-247, and in *North & Judd Manufacturing Company* v. *United States,* 114 C. Cls. 355, 370; cf. *Schneiderman* v. *United States,* 117 C. Cls. 715[4]. And the courts have always attempted to construe cancellation clauses in such a way as to "support the contract and not render illusory the promises of both parties." *Sylvan Crest Sand and Gravel Co.* v. *United States,* 150 F. 2d 642, 644 (C.A. 2) (clause giving Government the right to terminate deliveries by contractor construed as requiring notice of termination within reasonable time or not at all, and as so construed to constitute sufficient consideration); cf. *United States* v. *Purcell Envelope Co.,* 249 U.S. 313.

b. The Government's promise under the contract may thus be regarded as a binding promise to perform subject to a condition precedent, or a promise offering two alternative means of performance, either of which constitutes a substantial detriment. The Government must either perform or withdraw the goods and turn them over to a person or agency having a statutory priority. It is too plain for argument that such a promise constitutes sufficient consideration under the private law of contracts.

---

[4] In the cited cases the Court of Claims upheld the Government's right to rely on the escape clause and to withdraw the goods from sale without liability in circumstances like some of those enumerated above. These cases do not, as petitioner suggests (Pet. 3 fn. 1), support the proposition that the Government is not bound because its promise is illusory; in each instance the court relied on the clause as being a term of a valid contract, and the implication is clear that the contract is not illusory. Compare also *Lobenstein* v. *United States,* 91 U.S. 324.

See, *e.g.*, 1 Williston, *Contracts* (Rev. Ed. 1936) §§ 103F, 104, and cases cited; Restatement, *Contracts* §§ 77, 79, 84; cf. *Goltra* v. *Weeks*, 271 U.S. 536, 548-549; *Sylvan Crest Sand & Gravel Co.* v. *United States*, 150 F. 2d 642 (C.A. 2).

2. Moreover, it is well settled that, whatever may be the law of consideration in private contracts, there are many circumstances in which, even where no statute expressly so provides, a bidder under a Government contract may become bound before the Government is bound. Thus in *Erie Coal & Coke Corp.* v. *United States*, 266 U.S. 518, the Government was allowed to rely upon a clause providing that it might at its election "rescind said sale at any time before August 1, 1922." This Court held that the contract was binding alike upon the United States and the bidders. 266 U.S. at 520. And in *Refining Associates, Inc.* v. *United States*, 109 F. Supp. 259 (C. Cls.), the bidder, despite his attempt to withdraw his bid before acceptance by the Government, was held bound on a bid containing a condition that the bidder must perform if the bid were accepted within fifteen days. Cf. *Scott* v. *United States*, 44 C. Cls. 524. Broadly speaking, these cases may be said to stand for the proposition that the contract may provide for a period, so long as it terminates at an ascertainable time, during which the bidder is bound and the Government is not, without being illusory. See *Singleton* v. *District of Columbia*, 198 F. 2d 945, 948 (C.A.D.C). In the present case, the Government's right to withdraw the goods from sale was to terminate

upon delivery; hence the contract is well within the principle stated.[5]

The sale of surplus war assets is not a commercial undertaking by the Government. It is a disposal to private purchasers, usually at terms advantageous to them, of goods of a kind to which they might otherwise have no access. It carries out an express statutory policy, having the objectives stated in Section 2, *infra*, pp. 12-14. Hence, cases holding that when the Government undertakes a commercial transaction it is subject to the same rules as private persons have no bearing. The present case is clearly distinguishable from cases such as *Cooke* v. *United States*, 91 U.S. 389, and *United States* v. *National Exchange Bank*, 270 U.S. 527, involving negotiable instruments issued by the Government, where, unless the Government is subject to the same law as private persons, the negotiability of its paper in the stream of commerce may be impaired. *Priebe & Sons* v. *United States*, 332 U.S. 407, cited by the petitioner, does not suggest that the law of consideration must be the same in government contracts as in private contracts. That case dealt with whether a liquidated damage clause was authorized by the statute pursuant to which the contract was made.

---

[5] Compare *United States* v. *New York & P. R. S. S. Co.*, 239 U.S. 88, in which the contractor was held liable under a contract even though the Government was not bound at all, because the contract was not reduced to writing as required by statute.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

OSCAR H. DAVIS,
Acting Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
SAMUEL D. SLADE,
T. S. L. PERLMAN,
Attorneys.

JULY, 1953.

APPENDIX

The pertinent provisions of the Surplus Property Act of 1944, 58 Stat. 765, as amended by the Act of May 3, 1946, c. 248, 60 Stat. 168, read as follows:

SEC. 2. The Congress hereby declares that the objectives of this Act are to facilitate and regulate the orderely disposal of surplus property so as—

(a) to assure the most effective use of such property for war purposes and the common defense;

(b) to give maximum aid in the reestablishment of a peacetime economy of free independent private enterprise, the development of the maximum of independent operators in trade, industry, and agriculture, and to stimulate full employment;

(c) to facilitate the transition of enterprises from wartime to peacetime production and of individuals from wartime to peacetime employment;

(d) to discourage monopolistic practices and to strengthen and preserve the competitive position of small business concerns in an economy of free enterprise;

(e) to foster and to render more secure family-type farming as the traditional and desirable pattern of American agriculture;

(f) to afford returning veterans an opportunity to establish themselves as proprietors of agricultural, business, and professional enterprises;

(g) to encourage and foster post-war employment opportunities;

(h) to assure the sale of surplus property in such quantities and on such terms as will discourage disposal to speculators or for speculative purposes;

(i) to establish and develop foreign markets and promote mutually advantageous economic relations between the United States and other countries by the orderly disposition of surplus property in other countries;

(j) to avoid dislocations of the domestic economy and of international economic relations;

(k) to foster the wide distribution of surplus commodities to consumers at fair prices;

(l) to effect broad and equitable distribution of surplus property;

(m) to achieve the prompt and full utilization of surplus property at fair prices to the consumer through disposal at home and abroad with due regard for the protection of free markets and competitive prices from dislocation resulting from uncontrolled dumping;

(n) to utilize normal channels of trade and commerce to the extent consistent with efficient and economic distribution and the promotion of the general objectives of this Act (without discriminating against the establishment of new enterprises);

(o) to promote production, employment of labor, and utilization of the productive

capacity and the natural and agricultural resources of the country;

(p) to foster the development of new independent enterprise;

(q) to prevent insofar as possible unusual and excessive profits being made out of surplus property;

(r) to dispose of surplus property as promptly as feasible without fostering monopoly or restraint of trade, or unduly disturbing the economy, or encouraging hoarding of such property, and to facilitate prompt redistribution of such property to consumers;

(s) to dispose of surplus Government-owned transportation facilities and equipment in such manner as to promote an adequate and economical national transportation system; and

(t) except as otherwise provided, to obtain for the Government, as nearly as possible, the fair value of surplus property upon its disposition.

* * * * *

SEC. 4. Surplus property shall be disposed of to such extent, at such times, in such areas, by such agencies, at such prices, upon such terms and conditions, and in such manner, as may be prescribed in or pursuant to this Act.

* * * * *

SEC. 6. The activities of the Board shall be coordinated with the programs of the armed

forces of the United States in the interests of the war effort. Until peace is concluded the needs of the armed forces are hereby declared and shall remain paramount. The Board shall have general supervision and direction, as provided in this Act, over (1) the care and handling and disposition of surplus property, and (2) the transfer of surplus property between Government agencies.

* * * * *

SEC. 12. (a) It shall be the duty of the Administrator to facilitate the transfer of surplus property from one Government agency to other Government agencies for their own use * * *; and the transfer of surplus property under this section shall be given priority over all other disposals provided for in this Act * * *.

* * * * *

SEC. 16.(a) The Administrator shall prescribe regulations to effectuate the objectives of this Act to aid veterans in the acquisition of surplus property, in appropriate quantities and types, to enable them to establish and maintain their own small business, professional, or agricultural enterprises. Disposals of surplus property (except real property) to veterans under this subsection shall be given priority over all other disposals of property provided for in this Act except transfers to Government agencies under Section 12.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 243223 49

18

Office - Supreme Court, U. S.
FILED
AUG 21 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 122

MARTIN O. WEISBROD,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit.

Reply Brief

PHILIP B. KURLAND
JOHN PAUL STEVENS
MARTIN O. WEISBROD
Counsel for Petitioner

ROTHSCHILD, STEVENS & BARRY
120 S. La Salle Street
Chicago, Illinois
Of Counsel

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 122

MARTIN O. WEISBROD, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF.

May it Please the Court:

Respondent rests on the contention that the escape clause should be construed as though it read as follows:

> "The Government also reserves the right to withdraw from sale any property prior to the removal thereof without incurring any liability, *provided that the withdrawal is for the purpose of providing for the intervening needs of other agencies, of the armed forces, or of sales to veterans,* except to refund to the purchaser any amount, paid with respect to such property." (R. 6; Respondent's Br. 7)[1]

[1] The italicized insertion, except for the first few words, is taken verbatim from Respondent's brief.

There are compelling reasons for rejecting this contention.

1. The simple language of the escape clause does not remotely suggest that the italicized proviso should be interpolated into the contract.

2. In cases in which the Government was defending its right to invoke the escape clause, the Court of Claims was persuaded—presumably by Government counsel—that the clause was not limited to the three purposes identified here. In *Silverton* v. *United States*, 118 Ct. Cls. 232 (1951), Silverton, the plaintiff, unsuccessfully contended that the escape clause should be restricted by its purposes. In holding for the Government, the Court said (at p. 246):

> "It is true that the general counsel for the agency in explaining why these escape clauses were written into the contract gave three reasons why he regarded such reservations as desirable. These three reasons are set out in finding 6[2]. However, these reasons were not written into the contract, the terms of which are specific, concise, and do not require the giving of any reason so long as the facts of the case bring them within the terms of the exception—namely, the escape clauses."

3. The interpretation of the escape clause which is offered to this Court by respondent does not appear to have been communicated to the officials responsible for the practical construction of the contract. Respondent has cited no regulation, and petitioner has found none, delineating a policy of withdrawing goods from sale for three reasons and no others. In other litigation, the Government has successfully defended a withdrawal of goods from sale to the plaintiff in order to sell them to persons who were neither "other agencies," "armed forces," nor "veterans."

---

[2] The reference to "three reasons" is an interesting coincidence since they are not the same as the three purposes referred to by respondent in the instant case.

Schneiderman v. *United States*, 117 Ct. Cls. 715, 93 F. Supp. 626 (1950). A private party to one of these standard contracts would indeed have a difficult time persuading a government contracting official that the right of withdrawal was as limited as respondent now contends.

4. No explanation is given for the most unusual assumption that the clause was designed to effectuate only three of the twenty-odd purposes stated in the Surplus Property Act of 1944, 58 Stat. 765, as amended in 1946, 60 Stat. 168. (See Respondent's Br. pp. 12-14). Nothing in the contract identifies these three purposes as the sole grounds for withdrawal, and there is nothing in the statute which makes it appropriate to limit the broad language of the escape clause to three purposes and to exclude all others.[3]

It is interesting to note that respondent has made a guarded concession that a right of withdrawal for more than three reasons might render the contract invalid (Br. 7 n. 3) In view of this concession, respondent could not have argued that the clause was intended to effectuate all of the purposes of the Act. Nevertheless, the selection of only three such purposes is a rather artificial compromise between two dangerous alternatives. For, if respondent had relied squarely on either the language of the escape clause or the purposes of the legislation, its argument would have been as transparent as its alleged obligation.

---

[3] The particular language of the statute upon which respondent relies is certainly not persuasive. Two of the three sections, 12(a) and 16(a), did not appear in the Act in the form quoted in respondent's brief until more than a year after petitioner signed the "Bid and Contract Form" here involved. In their original form these sections were clearly ineffective in the absence of specific enabling regulation. See 9 F.R. 13239. The third section, § 6, as well as the other two prior to the 1946 amendments, refers to activities and duties of the War Surplus Board, whereas the record indicates that the escape clause was drafted by the Treasury Department (R. 6) and used by the Department of Commerce in its forms (R. 7).

CONCLUSION.

The Government does not dispute petitioner's view that the question presented is of general importance. Since it was erroneously decided by the Court of Appeals, this Court is urged to grant certiorari.

Respectfully submitted,

PHILIP B. KURLAND,
JOHN PAUL STEVENS,
MARTIN O. WEISBROD,
Counsel for Petitioner.

ROTHSCHILD, STEVENS & BARRY,
Of Counsel.

Office - Supreme Court, U
FILED
OCT 23 1953
HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 122

MARTIN O. WEISBROD,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit.

PETITION FOR REHEARING.

MARTIN O. WEISBROD,
Petitioner, *pro se.*

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 122

MARTIN O. WEISBROD,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit.

PETITION FOR RE-HEARING.

May it Please the Court:

Denial was entered October 12, 1953. It may be apparent from the record that the Government's claim for a few hundred dollars has been contested by petitioner as a matter of principle. And, having practiced law for more than twenty-six years, he knows the odds against the allowance of this petition for rehearing. Yet, while he still has this expiring right to defend a classic rule of law, a veritable cornerstone of Anglo-Saxon civilization, it is his duty to do so.

I.

The necessity of consideration as a foundation of a commercial contract has been directly undermined, for the first time, by the decision of the lower court in this case. No amount of legal prestidigitation can alter the solid rock of petitioner's position:

(a) A contract must have consideration in order to be enforceable, and

(b) This rule applies to commercial contracts made by the Government.

From the very inception of this litigation, petitioner has earnestly, though naively, attempted to have the Courts of the United States uphold the traditional sanctity of private contracts. If this petition for rehearing fails to accomplish that purpose, his conscience is clear.

II.

Petitioner could have no cause for complaint if the very excellent reasons for withdrawing goods from sale, which are set forth in the Government's brief, were set forth in the contract. The evil of the decision lies in exempting the Government from enforcement of the contract for arbitrary and undisclosed reasons, while enforcing it against a private citizen. A Pandora's box of evil is opened when petty officials of disposal agencies may exercise an *arbitrary* power of withdrawal. There is at present too much of a buzz-saw danger to the hands of a private citizen in his contacts with Federal officialdom. This case puts a seal of approval on the exercise of such human qualities as greed, favoritism and incompetence to which Governmental employees are just as prone as are private citizens. In the handling of surplus war materials, it is almost a matter of judicial notice and certainly of Congressional

Record that such officials should not be given arbitrary power to cancel the doctrine of mutuality of obligation.*

CONCLUSION.

The Chief Justice did not deliberate on the original petition for certiorari. Also, it is possible that the emphasis has been misplaced in the original petition. Perhaps it should have stated more forcibly that the seemingly innocent opinion of the lower court contains the seeds of a monstrosity which should not be allowed to multiply. The cloak of sovereignty should not be used as a cloak of immunity to arbitrary actions of government employees when engaged in commercial transactions. The volume of government business in our national economy is of vast importance. The distinction between sovereignty and business when the United States is a party to a contract must not be confused by a badly reasoned decision in the Circuit Court of Appeals. Until Congress has directly modified the necessity for consideration in Government contracts, that corner-stone of our laws should not be undermined.

Respectfully submitted,

MARTIN O. WEISBROD,
Petitioner pro se.

I, Martin O. Weisbrod, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

.....

Pro Se.

---

* Final Report of the Select Committee to Investigate Disposition of Surplus Property, 79th Congress, 2nd Session, Pursuant to H. Res. 385 (House Report No. 2738) Page 35;
Report of the Committee on Expenditures in the Executive Departments Pursuant to Senate Resolution 75 (80th Congress) Senate Report No. 1365, Pages 10, 11 and 12;
Quarterly Progress Report to Congress by War Assets Administration—4th Quarter, 1946, page 6;
Quarterly Progress Report to Congress by War Assets Administration—4th Quarter, 1947, Page 74;
Fulton Iron Co. v. Larson, 171 F. (2d) 994, 996.